11-1700-4595-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Karen A. Vovk,

Complainant,

vs.

Tom Thumb Food Markets, Inc.,

Respondent.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The above-captioned matter came on for hearing before Administrative Law Judge Barbara L. Neilson in the courtrooms of the Office of Administrative Hearings on October 22, 1990. The hearing continued on October 23 - 24, 1990, December 26 - 27, 1990, January 29, 1991, and February 1, 1991. The hearing was held pursuant to a Complaint and a Notice of and Order for Hearing issued by the Office of Administrative Hearings on April 2, 1990.

James G. Ryan, Esq., Mavity and Ryan, 426 Parkdale Plaza, 1660 South Highway 100, Minneapolis, Minnesota 55416, appeared on behalf of the Complainant, Karen A. Vovk. George L. May, Esq., Hertogs, Fluegel, Sieben, Polk, Jones and LaVerdiere, 999 Westview Drive, Hastings, Minnesota 55033, appeared on behalf of the Respondent, Tom Thumb Food Markets, Inc. The record closed on May 10. 1991, the date the final filing was received.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUES

The issues in this case are as follows:

VI) Did the Respondent discriminate against the Complainant in her employment at Tom Thumb Food Markets, Inc. because of her sex?

(2) Is the Complainant properly entitled to compensatory damages, damages for mental anguish and suffering, punitive damages, and attorney's fees and costs and, if so, in what amounts?

(3) Should a civil penalty be assessed against the Respondent?

Based upon all the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Tom Thumb Food Markets, Inc. ("Tom Thumb"), owns and operates a chain of approximately 180 to 200 convenience stores. Seventy percent of its stores are located in the Twin Cities metropolitan area, and the remainder are located in northern Minnesota and western Wisconsin. Tom Thumb employs approximately 1,500 employees.

2. The Complainant, Karen A. Vovk, is a 26-year-old female resident of the state of Minnesota. She commenced working for Tom Thumb as an assistant manager at store 123 in Rosemount, Minnesota, on September 1, 1986, at the rate of $5.00 per hour. Ms. Vovk received a raise to $5.50 per hour on November 9, 1986. On March 15, 1987, Ms. Vovk entered Tom Thumb's management training program to become a store manager.

3. After she completed the training program, Ms. Vovk was assigned to a temporary position for approximately one to two weeks and then was offered a position as manager of a Tom Thumb store in Cottage Grove. Ms. Vovk accepted this offer and worked as the manager of the Cottage Grove store for approximately one to two weeks. She then was offered and accepted a position as store manager of Store 123 in Rosemount, Minnesota. Ms. Vovk was told that the job was being offered to her because she knew how Wallace Pettit, the President of Tom Thumb, liked things done in that store from her six-month stint as the assistant manager of the store. Ms. Vovk assumed the position of store manager at Store 123 effective June 25, 1987, at a salary of $350 per week.

4. Each Tom Thumb store is run by a store manager. Store managers report to supervisors, who are responsible for a certain number of stores (between 5 and 15 stores) within a given geographical territory. Supervisors report to a district supervisor, who is responsible for all stores within a larger geographical territory.

5. During the period of time that Ms. Vovk managed Store 123, George Cellette was the district supervisor of the territory encompassing her store. Mr. Cellette was the immediate supervisor of approximately 10 to 15 supervisors in that district. Each of the supervisors in turn were responsible for 8 to 12 store managers within their territories. Ms. Vovk's supervisor was Tom Johnson.

6. Ms. Vovk's position included managing a laundromat next door which was owned either by Tom Thumb or by Wallace Pettit. The laundromat contained 20 to 25 standard-size washers, four industrial-size washers, and approximately 15 dryers. During Ms. Vovk's tenure as store manager of Store 123. Mr. Pettit had all the electric dryers replaced with gas dryers. Although the process was supposed to take only a few weeks, it took six weeks to two months because of problems with the delivery and hook-up of the machines. The laundromat was closed during that entire time, When the laundromat was open, its customers often made purchases from Store 123 while doing their laundry, including detergent, soft drinks, and snacks. Typically, 50 to 70 laundromat customers patronized the Tom Thumb Store 123 on week days and 70 to 100 laundromat customers patronized Store 123 on weekend days.

7. On August 28, 1987, after having been interviewed by Ms. Vovk and Mr. Johnson, Richard Kipp began working in Store 123 as a full-time clerk. Mr. Kipp was 38 years old at the time he was hired and had three bachelors degrees. The job for which he has hired by Tom Thumb paid approximately $3.75 per hour. Ms. Vovk recommended against hiring Mr. Kipp because she believed that he was over-qualified. Mr. Johnson disagreed, and Mr. Kipp was hired.

8. Ms. Vovk recommended raises for Mr. Kipp in the fall of 1987, and described Mr.Kipp as an "excellent" employee. After Mr. Kipp had worked at Store 123 for a time, Mr. Johnson requested that he assist store managers at other nearby Tom Thumb stores by replacing old merchandise with new merchandise, resetting the freezers and coolers, replacing spoiled merchandise, resetting the shelving in the main store areas, rotating the products, performing overall cleaning of the stores, conducting price changes as necessary, and carrying out other duties. As a result, Mr. Kipp did not work many hours at Store 123 during January and February of 1988. He returned full-time to Store 123 in March 1988.

9. Mr. Kipp worked the following hours at Store 123 during the period June 27, 1987, through June 25, 1988:

August 1987	12.00 hours
September 1987	168.00 hours
October 1987	180.50 hours
November 1987	164.00 hours
December 1987	114.00 hours
January 1988	36.00 hours
February 1988	18.00 hours
March 1988	146.75 hours
April 1988	158.25 hours
May 1988	194.50 hours
June 1988	150.75 hours

10. On several occasions prior to and during April 1988, Mr. Kipp related to Ms. Vovk stories about prostitutes he had known when he lived in Duluth. In April of 1988, Ms.Vovk and Mssrs. Cellette, Johnson, and Kipp spent an entire weekend at Store 123, restocking the store, bringing price changes up to date, and cleaning the shelves, windows, produce rack, dairy case, and floor. While Mr. Kipp and Ms. Vovk were cleaning shelves during this weekend, Mr. Kipp described in detail what the prostitutes did at their customers' request. He told her about "blow jobs," "hand jobs," "golden showers," and other activities, and what the prostitutes charged for those services. Ms. Vovk was insulted and angry that Mr. Kipp would discuss these matters with her. She felt extremely uncomfortable because it appeared to her that Mr. Kipp was expressing a sexual interest in her.

11 Ms. Vovk first complained to Mr. Johnson that Mr. Kipp talked a lot about prostitutes in November 1987. Mr. Johnson took no action in response to

that complaint- Within one week after Mr. Kipp's discussion of prostitutes in April 1988, Ms. Vovk complained to Tom Johnson about Mr. Kipp's remarks and told him that it made her very uncomfortable.

12. In April 1988, while Ms. Vovk was working at Store 123, Mr. Kipp came into the store and confronted her about leaving too long a list of things to be done in the store during the previous shift. Mr. Kipp, who is 5'10-1/2"

tall and weighed approximately 175 pounds at the time, screamed at Ms. Vovk , shouted obscenities at her, and flailed and waived his arms . Ms. Vovk was frightened for her safety. She attempted to calm Mr. Kipp down, but Mr. Kipp remained agitated. Ms. Vovk tried to talk about the worklist . She told Mr. Kipp that he had to prioritize the list and that it was not necessary to accomplish every item on the list every day if he was bus, , but Mr. Kipp would not let her speak. He continued to scream at her, point his finger at her, waive his arms near her face, and back her into a corner. At one point, Mr Kipp held his fist approximately two inches from Ms. Vovk' s face and said, 'I haven't had sex in ten years. How do you think that makes me feel?" Ms. Vovk was afraid that Mr. Kipp was going to hit her. She tried to remain calm, told him that that did not have anything to do with what they were discussing and that she did not want to hear about it. Mr. Kipp again yelled at her, "How would you feel?" By this time, Ms. Vovk was crying and trembling. Mr. Kipp continued in this fashion for 15 to 20 minutes. During this discussion, Mr Kipp swore and called Ms. Vovk a "dumb bitch," a "God-damred fucking bitch, a "whore," and a "slut," among other things. This intercharge was witnessed by two regular customers who testified at the hearing. One of them described Ms. Vovk as being "pale," "visibly shaken," "scared," and "all hunched up." One of these customers was so concerned for Ms. Vovk's safety that he remained in the store for four to five minutes until Kipp's tone appeared to be calmer and the customer believed that Ms. Vovk was no longer in physical danger.

13. After Mr. Kipp left Store 123 and Ms. Vovk calmed down, she called her supervisor, Tom Johnson, and told him that Mr. Kipp had been screaming and yelling vulgarities and obscenities at her, flailing his arms at her, screaming at her that he had not had sex in ten years, and demanding to know how she thought that made him feel and how she would feel if she had not had sex in such a long period of time. Ms. Vovk told Mr. Johnson that she had felt threatened and had been afraid for her physical safety throughout the

incident and that she felt some disciplinary action should be taken against Mr. Kipp. She asked for Mr. Johnson's advice. Mr. Johnscn told Ms. Vovk that Mr. Kipp was probably just "blowing off steam" and that she should just "let it slide." Mr. Johnson did not conduct any investigation as a result of this report.

14. Following the two April 1988 incidents described above, David Strese, a regular customer of Store 123, reported to Ms. Vovk that he had come into the store to make a purchase and that Mr. Kipp placed the money into his own pocket and did not ring up the sale. Ms. Vovk immediately reported this incident to Mr. Johnson in person, and also told him that Mr. Kipp was attempting to organize a walk-out of store employees. She told Mr. Johnson that, in her opinion, given all of Mr. Kipp's conduct to date, Mr, Kipp should be relieved of his duties- Mr. Johnson said nothing in reply.

15. Mr. Johnson later approached Mr. Kipp and said, "You are not going to believe this but" a customer had reported seeing him not ring up a sale and pocket the money, Mr. Kipp denied the report, and Mr Johnson did not do anything further.

16. In May 1988, David Strese's mother (a customer of Store 123) reported that she had overheard Mr. Kipp tell another employee in the store that David Strese (who at that time was dating Ms. Vovk) had hired a 16-year-old store employee (Deanna Anderson) to work for him because he wanted to have sex with her. When Ms. Vovk learned of the report, she was angry that Mr. Kipp was continuing to harass her by making sexual remarks about her boyfriend to other store employees. She contacted Mr. Johnson and told him of

the incident, and Mr. Johnson told her he would speak with Mr. Kipp. Mr. Johnson later spoke to Ms. Vovk and told her that Mr, Kipp wanted to meet with the customer so that he (Mr. Kipp) could "confront" the customer. Mr. Johnson requested that Ms. Vovk have Mrs. Strese come in to discuss the comment with Mr. Kipp. Mr. Johnson intended to attend the meeting with Mr. Kipp and Mrs. Strese. No meeting was ever arranged because Mrs. Strese did not want to come into the store to be confronted by Mr. Kipp. Mr. Johnson made no attempt to investigate the incident by speaking to Mrs. Strese himself. He did not take any action in response to Ms. Vovk's report other than to speak to Mr. Kipp and relay Mr. Kipp's demand that Mr. Kipp be allowed to confront the customer himself. In its submission to the Department of Human Rights, the Respondent stated that this incident occurred "two weeks prior to June 3."

17. After Mr. Kipp heard what Mrs. Strese had said, he told Mr. Johnson that he was not going "to put up with this." He told Mr. Johnson that he had "had it with Karen" and was going to get a lawyer. Mr. Johnson told Mr. Kipp he would speak to Ms. Vovk about the incident, encouraged Mr. Kipp to stay, and told him that he (Mr. Kipp) was the one keeping the place together.

18. On June 2, 1988, Ms. Vovk left work early due to a sinus infection. When she returned to work the following morning (June 3, 1988), her cashier, Cheri Kreisel, told her that Mr. Kipp had told Ms. Kreisel in front of store customers that Ms. Vovk had gone home sick the previous day in order to "have sex with her boyfriend." Ms. Vovk was angry about the continuing harassment by Mr. Kipp and the failure of Respondent to take any action. She called Kevin Lerdon's store in Inver Grove Heights on the morning of June 3, 1988, where she Knew Mr. Johnson was likely to be at that time of day. Mr. Johnson was not at Mr. Lerdon's store at that time. Ms. Vovk told Mr. Lerdon about the incident. Unknown to Ms. VovK, Mr. Kipp was standing next to Mr. Lerdon when her telephone call was received, and Mr. Kipp overheard what Ms. Vovk was saying because Mr. Lerdon held the phone away from his ear

19. Ms. Vovk placed another call to Mr. Lerdon's store sometime later during the morning of June 3, 1988, and Mr. Johnson was there. She told Mr. Johnson that something had to be done about Mr. Kipp that day. She told him that she wanted him and George Cellette to come to her store immediately so that the problem could be taken care of once and for all. Mr. Johnson said, "OK," they would come to the store later.

20, After speaking to Mr. Johnson, Ms. Vovk was greatly relieved. She was frightened of Mr. Kipp and believed that the company was finally going to take appropriate action against Mr. Kipp.

21. While Ms. Vovk waited for Mr. Johnson and Mr. Cellette to arrive, Mr Kipp arrived at her store and began screaming obscenities at her, demanding to know who had told her that he had made the remark the previous day Mr. Kipp accused Ms. Vovk of lying, called her a "bitch", and said, "Well, have you had sex with Dave [Strese]? Have you had sex?" Ms. Vovk told Mr. Kipp that Mr. Johnson and Mr. Cellette were coming in that day and that the whole matter was going to be resolved. Mr. Kipp told her that that did not matter because she was the one who was going to be fired. A greeting card vendor, John Fuller, was present in the store for approximately ten minutes during Mr. Kipp's discussion. Mr. Fuller found the language used by Mr. Kipp to be vulgar, testified that he would not use such language "on my dog," and said that Mr. Kipp "looked like he could have become physically violent."

After Mr. Kipp left the store, Mr. Fuller told Ms. Vovk that he thought Mr. Kipp should be fired for his conduct and told her how to reach him if she ever needed him to tell anyone what had occurred,

22. Ms. Vovk was frightened and scared during Mr. Kipp's outburst and was relieved that Mr. Johnson and Mr. Cellette would be coming to the store that day to finally resolve the situation.

23. Later during the morning of June 3, 1988, Ms. Vovk prepared to go to the bank to make that day's deposit. She was about to take the deposit to the bank when George Cellette drove into the store's parking lot. Ms. Vovk turned around and put the deposit in the top of the store's safe and put the safe on "day lock." Mr. Cellette came into the store and began to walk up and down the aisles, inspecting the store. Tom Johnson arrived a short time later and they told Ms. Vovk that they were going to conduct a random cash audit of her cash register and of the cash in the safe. Ms. Vovk told !hem that a customer had come in that morning and had given her $20 to cover a returned check and that they would be $20 over The audit took 15 to 25 minutes and, in fact, revealed that she was $20 over.

24. Mr. Cellette and Mr. Johnson then took Ms. Vovk into the back room of the store. Mr. Cellette told Ms. Vovk that they were going to let her go because she had "lost control of an employee" and "had not followed company policy." At the end of their discussion, Mr. Cellette offered to put Ms. Vovk into an assistant manager's position at another store. Ms Vovk did not accept this offer. When Ms. Vovk asked whether she would receive severance pay for being "fired," Mr. Cellette said, "You are not being fired, you are being let go. " At that point, Ms. Vovk handed her keys to Mr. Johnson, hung up her smock, and went to the cash register to pay for some decongestant she had used that morning. She told Mr. Johnson that she could not believe he would believe Mr. Kipp over her. Mr. Johnson said nothing

25. Mr. Kipp called Mr. Johnson the day before Ms. Vovk's separation from employment from Tom Thumb to give Mr. Johnson two weeks notice prior to quitting his job. Mr. Johnson told him to "hold off for a day," and to go see "his buddy Kevin Lerdon" at the Inver Grove Heights store the following

morning.

26. Joseph Andrew, the Director of Training of Tom Thumb during June of 1988, was instructed in early May 1988 to begin looking for a person to replace Ms. Vovk at Store 123.

27. From February 14, 1986, through July 25, 1988, the Respondent had in effect a policy on sexual harassment. The language of the policy suggested that, in order for the law prohibiting sexual harassment to be violated, the person doing the harassing had to be in a supervisory position over the employee being harassed.

28. Although the Tom Thumb store managers' training course generally included coverage of sexual harassment, neither Ms. Vovk nor Mr. Johnson could recall receiving any training on sexual harassment. The duties of Mssrs. Johnson and Cellette while employed by Tom Thumb included preventing and stopping any sexual harassment with respect to employees within their territories. If complaints of sexual harassment were not investigated, it would be a violation of Tom Thumb's company policy.

29. The written policy on sexual harassment in effect during 1988 did not descri be speci fi c procedures to be fol 1 owed in mak ing compl a int s or the action the company would take if a complaint were made. The Tom Thumb supervisory personnel who testified at the hearing agreed that a valid report of sexual harassment could be made by any employee by means of an oral report to that employee's immediate supervisor. They also agreed that an oral report was just as effective as a written report and that any report was to be treated seriously by the person to whom it was made.

30. Neither Mr. Johnson nor any other supervisory person within Tom Thumb's corporate structure conducted any investigation whatsoever in response to any report made by Ms. Vovk of harassing behavior by Mr. Kipp.

31. It was perfectly proper for a store manager having a problem with a person under his or her supervision to seek the advice of his or her superior regarding proper procedures to be followed. It was Ms. Vovk's understanding that store managers did not have the authority to discharge an employee without the consent of his or her supervisor.

32. No disciplinary action was ever taken against Mr. Kipp as a result of the allegations made by Ms. Vovk.

33. When Ms. Vovk worked as an assistant manager in Store 123, she was paid at a rate of $5.00 per hour, or $200 per week. Her salary as store manager was $425 per week.

34. The salary that would have been given to Ms. Vovk had she accepted the offer of an assistant manager position with the Respondent was never discussed with Ms. Vovk. It is likely that Ms. Vovk's salary would have been reduced had she accepted the assistant manager position.

35. When Ms. Vovk was relieved of her duties, Mr. Johnson filled out a personnel action form documenting her removal from the payroll. Attached to that form was a statement signed by Mr. Johnson which provides as follows:

> 1) While performing a cash audit at Store #123 on 6/2/88 the following policy violations were noted.
>
> A) 449.53 in till one and 312.44 in second till - max. allowed is $200 in each drawer.
>
> The deposit was in top portion of safe, is always to be locked in bottom of safe.

C) An employee; [sic] check had been cashed was in the check run of previous days [sic] deposit,

D) None of the checks in tills had been endorsed.

Exhibit 2, p. 19.

36. In response to Ms. Vovk's application for unemployment compensation, the Respondent replied as follows :

> The claimant voluntarily quit on 6-2-88, walked off the job. The claimant had been moved to a management position. George Collette [sic] felt that the claimant was having problems handling the store and went to check on her. He found that the claimant was not paying attention to her duties . He checked the register & found checks that had not been endorsed. A $100.00 bill in the top drawer and $160.00 in $20's that were also in the drawer. These items are all against company policy. At this point, an assistance [sic] managers [sic] position was offered because Mr. Collette f elt that the claimant was not handling the job properly. The claimant asked many times if she was being fired. She was told "no". The claimant turned her keys in and walked off the job.

Exhibit 19, p. 6.

37. In response to Ms. Vovk's charge of discrimination, Tom Thumb gave the following reasons for relieving Ms. Vovk of her duties:

> The reasons she was being remove [sic] as the manager was the lost [sic] of overall control of the store. As an example, inventory losses for March, April, and May totalled $5115.00 which means that much merchandise disappeared from the store and could not be accounted for. She was having difficulty getting price changes done, the store at various times was not clean and orderly, store employees were not projecting the type [of] customer service Tom Thumb requires, the store was not being opened on time on some days, and there were various times when she left the store in early afternoon prior to completing her duties as manager.

Exhibit 6, p. 2.

38. A written di scipline and discharge policy was in effect at Tom Thumb throughout the entire term of Ms. Vovk's employment. The main purpose of the policy was "to insure fair and equitable treatment of all Tom Thumb employees (Ex, 9, p. 4-18, 7 1) The policy was mandatory in its terms and required, before any employee could be disciplined or discharged for reasons covered by the policy. that the written warning procedure first be followed. Demoting someone to a position having less authority or responsibility or reducing an employee's compensation constituted forms of discipline under the policy.

39. The evidence was conflicting concerning whether the Tom Thumb discipline and discharge policy was intended to apply to supervisory employees

such as store managers

40. The discipline and discharge policy set up three categories of offenses: minor offenses, serious offenses, and gross misconduct. (Ex 9 , PP 4-23 to 4-28.) The type of written warning or other disciplinary action to be taken depended upon what category of offense was involved.

41. Attached to the discipline and discharge policy were two kinds of written warning forms which were to be used in the event of a minor or serious offense. Under the policy, written warnings could only be issued on those particular forms. (Ex. 9, pp. 4-20, 4-29, 4-30.)

42. If an employee committed a minor offense, a Step I Warning Notice was to be issued. The following information was to be included on the Step I Warning Notice:

1. A description of the offense involved.

2. The improvement needed or the corrective action the employee was required to take.

3. Suggestions to the employee on how to effect the improvement or correction needed.

4. The setting of a 30-day period for the employee to make the improvement or correction.

5. A warning to the employee of what will happen if the improvement or correction is not made within the 30-day period.

6. The signatures of both the person issuing the warning and the employee to whom it is being issued.

Ex. 9, p. 4-20.

43. Minor offenses for which issuance of a Step I warning would be appropriate included unsatisfactory work performance, poor punctuality, failure to follow instructions, and violation of company policy. (Ex. 9, pp. 4-23 to 4-24.) Unsatisfactory work performance by store managers included not following proper product rotation procedures on a consistent basis, not keeping prices up to date, allowing the overall condition of the store to deteriorate, and Indent control problems. Minor offenses also included failing to open the store on time on a consistent basis, violating policies with respect to the amount of money which could be kept in the register drawer, and failing to place endorsements on checks upon receipt from customers.

44. Among the purposes of the Step I warning policy were to provide clear notice to an employee that his or her supervisors believed there was a problem

with the employee's performance, give the employee instructions about how to correct the problem, afford the employee a reasonable period of time within which to correct the problem, provide the employee with an opportunity to take
corrective action in order to prevent any discipline from being imposed, and notify the employee what action would be taken if the problem were not

corrected. In cases involving a gradual deterioration of performance over time, the policy was designed to provide the employee with fair not ice of the problem and a fair opportunity to correct the problem and avoid the imposition of any discipline.

45. Commission of a serious offense by an employee was to be followed by the issuance of a Step 11 Warning Notice. The Step 11 Warning Notice was to contain the same information as the Step I Warning Notice described above. A Step 11 warning was also to be issued for repetition of a minor offense for which a Step I warning had already been issued. (Ex. 9, pp. 4-20 and 4-30.)

46. The policy classified three offenses as serious offenses: disorderly conduct (i.e., harassment of other employees based on sex, race, age, etc., aggressive verbal or physical conduct which falls short of "reckless conduct," and conduct which interf ere s with production), negligent conduct (i .e . , negligence which results in minor physical injury, property damage or financial loss), and smoking in unauthorized areas. (Ex. 9, pp. 4-25 to 4-26.)

4 7 . In order to discharge a covered employee for minor offenses, both a Step I and a Step 11 Warning Notice would first have to be issued, followed by repetition of the offense or failure to correct the conduct in question. (Ex. 9, pp. 4-23 to 4-28.)

48. Discipline for a serious offense began at Step 11 and would be followed by discharge only if the offense were repeated or the employee failed to correct the problem in question. (Ex. 9, pp. 4-23 to 4-28.)

49- Gross misconduct could result in immediate termination. Gross misconduct included things like theft, fraud, falsification of records, possession or use of explosives or firearms on company premises, selling drugs on company premises, using alcohol on the job, insubordination, reckless conduct, etc. (Ex. 9, pp. 4-26 to 4-28.)

50. No written warnings were ever issued to Ms. Vovk for any aspect of her performance during the entire time she was employed by the Respondent.

51. The only written evaluation of her performance that Ms. Vovk ever received was a performance evaluation given to her in December 1987. The evaluation rated her overall performance above average and awarded her a $50 per week raise for doing her job well and an additional $25 a week for taking on new responsibilities at Don's Food and Gas. Ms. Vovk was rated "Excellent" in two Categories, "Above Average" in seven categories, and "Average" in one

category. Elsewhere on the form, she received the lowest possible rating of "I" on inventory control. Mr. Johnson told Ms. Vovk at the review that she was doing a "really good job." (Ex. 2, pp. 17-18.)

52. Step warnings in fact were issued by Tom Thumb both to staff persons and to stone managers. (Exs, 12 and 34.) Exhibit 34 includes a Step II warning dated April 24, 1987, that was issued by George Cellette and Lee Ann LaBore to Kevin Slavin, the store manager of Store 115. The reasons for the issuance of the warning to Mr. Slavin included "[g]eneral Store Appearance, Deli Cleanliness, Backroom and Office Organization need improvement. Kevin must communicate and follow thru with his employees; he cannot do all the work himself."

53. With the exception of the random cash audit conducted on June 3, 1988, no random cash audit had ever been conducted while Ms. Vovk managed Store 123. During the thirteen months following Ms. Vovk's discharge during which Michael Mahlow managed Store 123, no random cash audits were conducted by any supervisor at any time.

54. From June 1, 1986, to May 31, 1987, the fiscal year immediately preceding Ms. Vovk's tenure as manager, the inventory losses at Store 123 averaged $239.50 per month. (Ex. 24.) During the first three months of Ms. Vovk's tenure as manager, the period of June through August of 1987, the inventory losses averaged $323.67 per month. (Ex. 25.) From September of 1987 (Mr. Kipp's first full month of work) through May of 1988, the inventory losses averaged $1,041.22 per month. From June 1988 (when Ms. Vovk was replaced by Michael Mahlow as store manager), through the end of February 1989 (the last full month Richard Kipp worked at Store 123), the inventory losses averaged $1,315.44 per month. (Exs. 26 and 29.)

55. in March 1989, Michael Mahlow received reports from customers that they had observed Mr. Kipp fail to ring up sales after taking money from customers. Mr. Mahlow informed his supervisor and hidden cameras were installed by Retail Surveillance, Inc. Mr. Kipp was observed on video tape engaging in clear violations of company policy, including repeatedly not ringing up sales to customers, taking merchandise for himself without paying for it and, on one occasion, giving away a bag of groceries to friends without requiring payment. (Ex. 20, p. 1.) Following a discussion with Mr. Kipp of the surveillance, Mr. Kipp indicated that he was going to resign because the president, Wallace Pettit, would fire him anyway.

56. After Mr. Kipp's employment was terminated in March 1989, the inventory problem at Store 123 improved. (Ex. 26.)

57. Mr. Mahlow's inventory losses at Store 123 exceeded those experienced by Ms. Vovk, at least through Mr. Kipp's last full month of employment. Mr. Mahlow's inventory losses from June 1988 through February 1989 totalled nearly $12,000, a figure higher than Ms. Vovk's losses ever were. (Exs. 25 and 26.) Despite these losses, Mr. Mahlow's supervisor never told him that he faced any disciplinary action because of the problem, they thought he was losing control of the situation, or the store was too much for him to handle.
When Mr. Mahlow left Tom Thumb, he resigned of his own accord, without any pressure from the company to leave.

SR. Although Mr. Johnson noted serious inventory problems at Store 123 in his review of Ms. Vovk's performance in December 1988, he rated her overall performance as above average. (Ex. 2, p. 18.)

59. Store 123 was to be opened on weekdays by 5:00 a.m. and on weekends bu 6:OO a.m. A computerized printout showing the time the alarm system was deactivated at Store 123 during the period from January 1, 1988, through June

15, 1988, indicates that the alarm was deactivated late only twice, once on March 9, 1988, and another time on May 21, 1988. On March 9, 1988, Steve Novotny, the store employee who was responsible for opening the store that day, overslept. Ms. Vovk went to open the store immediately after she was notified, and the alarm was deactivated at 6:11 a.m. that day. Ms. Vovk could not determine what reason there was for the late opening in May because the Respondent did not produce the time sheets for that Month.

60- Store managers differed in terms Of the amount of time it took them after entering the store to have it ready for business in the morning. For some managers, fifteen minutes was sufficient.

61. In addition to the two occasions on which Store 123 was opened late, there were only four occasions throughout the period from January 1, 1988, through June 3, 1988, when the alarm was turned off less than 15 minutes before the scheduled opening time: Wednesday, January 20, 1988 (4:56 a.m.)i Sunday, January 24, 1988 (5:51 a.m.); Thursday, February 5, 1988 (4:46 a.m.); and Tuesday, February 23, 1988 (4:46 a.m.). On all other days, the alarm was turned off at least 15 minutes before the scheduled opening time. (Ex. 17.)

62. From December 1987 through April 1988, Ms. Vovk was responsible for seeing to it that both Store 276 and Store 123 were opened in the morning at the same time. Although another individual was responsible for opening store 276, that person did not have a car. Ms. Vovk picked that person up at her house, drove her to Store 276, and then went to Store 123 to open that store herself.

63. At various times during Ms. Vovk's employment as store manager of Store 123, her supervisors observed that some produce in the store was spoiled, the store was low or out of certain types of products, some of the merchandise was out of date, the store appearance had deteriorated, and the store employees were not adhering to the dress code. They were also critical of store inventory losses and profit and loss figures.

64. Monthly evaluations of the condition of Store 123 conducted by the inventory service employed by Tom Thumb rated Ms. Vovk's store at a level of good" or "excellent" during the period of February through May 1988. The possible rating categories were "poor," "good," and "excellent." The ratings given to Ms. Vovk's store were as follows:

	2/24/88	3/10/88	4/27/88	5/31/88
Condition of Shelves	Good	Excellent	Good	Good

Store Properly Tagged	Good	Excellent	Good	Good
Condition of Displays	Good	Excellent	Good	Good
Condition of Dairy Cases	Good	Excellent	Good	Good
Condition of Frozen Cases	Good	Excellent	Good	Good
Condition of Produce Cases	Good	Excellent	Good	Good

65. in addition to evaluating the sales area as described above, the monthly evaluations by the inventory service also rated the back room area, The ratings given to Ms. Vovk's store were as follows:

	2/24/88	3/30/88	4/27/88	5/31/88
Merchandise Priced	Good	Excellent	Good	Good/Poor
Ad Merchandise Priced	Good	Excellent	Good	Good
Back Room Arrangement	Good	Excellent	Good	Good
Condition of Dairy Cooler	Good	Excellent	Good	Good
Condition of Frozen Cooler	Good	Excellent	Good	Good
Amount of Inventory	Heavy	Normal	Normal	Normal

(See Ex. 44.)

With respect to the 5/31/88 evaluati on of "Merc handise Priced" , the evaluator circled both good and poor without any indication which rating was to govern.

66. The evaluation form also asked the evaluators to respond to the following questions: "Was the stockroom well marked and prepared for inventory?" and "Was the sales floor well marked and prepared for inventory'" The rating categories provided with respect to these questions were "Poor," "Acceptable," "Good," and "Outstanding." The evaluators marked "Good" in response to these questions on each evaluation form.

67. At the time of her discharge from Tom Thumb, Ms. Vovk was paid $425 per week, or $22,100 per year. If Ms. Vovk had continued to work at Tom Thumb until February 1, 1991, the last day of the hearing, she would have earned the following amount in salary, assuming no raises would have been given to her during that period:

June 1988 through December 1988	$12,891.67 (7112 of $22,100)
Calendar year 1989	$22,100.00
Calendar year 1990	$22,100.00
January 1991 through February I , 1991	$ 1,937.53 (32/365 of $22,100)
TOTAL	$59,029.20

68. Ms. Vovk obtained a job driving a school bus for Independent School District No. 196 on August 11, 1988, at $8.00 per hour. She received a raise to $8.10 per hour on August 1, 1989, a raise to $8.20 per hour on August 1, 1990, and a raise to $9.15 per hour on August 23, 1990. See Ex. 41.

69. Ms. Vovk has received income in the following amounts between her discharge and the last day of the hearing:

1988	$ 2,639.00	Unemployment Compensation
	$ 2 , 1 5 7 . 7 6	Independent School District No. 196 (Ex. 39)
1989	$ 6,944.69	Independent School District No. 196 (Ex. 40)
1990	$10,231.82	Independent School District No. 196 (Ex, 42)
1 991	$ - 897 04	1 / 1 / 91 - 2 /1 /91 (32/365 of $10,231.82)
TOTAL	$22,870.31	

70. Subtraction of Ms. Vovk's earnings to date and the unemployment compensation she has received from the wages she would have earned had she remained employed at Tom Thumb yields $36,158.89.

71. Ms. Vovk began to attend business classes at inver Hills Community

College in September 1990 in order to improve her employment prospects. She has continued looking for full-time work at least once per week and has remained willing to accept a full-time job should one become available.

72. Ms Vovk has not applied for convenience store positions. Her experience at Tom Thumb soured her on working in a retail position in a convenience store and impaired her confidence in being able to manage other people and make her concerns known in an effective way to her superiors.

73. Ms. Vovk has engaged in reasonable efforts to mitigate her damages.

74. Ms. Vovk was very uncomfortable when Mr. Kipp described the activities of the prostitutes he had known in Duluth, and was shocked by his conduct in the store in April 1988 and on June 3, 1988. She was frustrated by the failure of Tom Thumb to take her reports of harassment seriously, to act on them, or to allow her to take action against Mr. Kipp. She was humiliated, shocked, angry, and emotionally devastated by her termination from employment with Tom Thumb. On June 3, 1988, she went home to her two children and cried for an extended period of time, worried about how she would be able to provide for them. As a result of her treatment by Tom Thumb, Ms.Vovk was extremely angry, experienced a loss of self-confidence which she has yet to regain, exper ienced frequent headac he s that lasted until December 1 988 , was extremely depressed, remains depressed to this day, and had great difficulty sleeping at night through November 1988. She did not see a psychiatrist or a psychologist f or her cond it i on be c au se s he d i d not be I i eve that s he wa s " crazy" and felt that she could handle the problem herself with the support of family and friends.

75. Prior to her termination from employment at Tom Thumb, Ms. Vovk had arranged for her brother's girlfriend to move to the Twin Cities from Wyoming to live with her and care for her two children while Ms. Vovk worked. Her termination from employment also caused her to worry about how she would provide for this individual. In late June or early July 1988, Ms. Vovk's two brothers moved to the Twin Cities to live with her to enable her to reduce her expenses. One brother cont inued to live w ith he r until Octobe r 1 988 and t he other until November 1989.

76. Ms. Vovk's emotional reaction to her treatment by Mr. Kipp, Tom Thumb's failure to take adequate measures to stop the harassment by Mr. Kipp, and Tom Thumb's decision to relieve her of her duties as store manager was genuine, understandable, and in accordance with what a person of normal sensibilities would likely experience as a result of such treatment. Tom Thumb's conduct evidenced a reckless disregard for Ms. Vovk's physical safety and for her right to be free of discrimination.

7 7 On Ma r ch 2 3 , 1 989 , M s . Vovk fileed a charge of d i s a r im ina t i on with t he Minnesota Department of Human Rights, alleging unlawful discrimination on the basis of sex and unlawful reprisal.

78. Because the Department of Human Rights had not issued a determination
w i th re spe c t to Ms . Vovk' s c ha rge of d i s c r imina t i on w i th in 1 80 day s from t he
filing of the charge, Ms. Vovk requested that a hearing be held before an Administrative Law Judge pursuant to Minn. Stat. 363.071 subd. la (1990).
On April 2, 1990, a Notice of and Order for Hearing was issued in this matter .

79. The parties waived the requirement set forth in Minn. Stat. 363.071, subd. 2 (1990) for personal service on the Respondent and service by registered or certified mail on the Complainant.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

I. The Administrative Law Judge has jurisdiction herein and authority to
take the action ordered under Minn. Stat. 14.50 and 363.071 (1990).

2. The Notice of and Order for Hearing was proper as to form, content and execution and all other relevant substantive and procedural requirements of law and rule have been satisfied.

3- The Respondent, Tom Thumb, is an "employer" for purposes of Minn. Stat. 363.01, subd. 17 (1990).

4. The Complainant, Karen Vovk, was an employee within the meaning of Minn- Stat. 363.01, subd. 16 (1990).

5. The Complainant has the burden of proof to establish by a preponderance of the evidence that the Respondent engaged in unlawful discrimination.

6. The Minnesota Human Rights Act prohibits covered employers from disc harging or discriminating against an employee with respect to terms, conditions, or privileges of employment because of sex, except when based on a bona fide occupational qualification, and also provides that it is an unfair discriminatory practice for any employer to "intentionally engage in any reprisal against any person because that person..... opposed a practice forbidden under this chapter . . . ." Minn. Stat. 363.03, subds. I and 7 (1990). The statute provides that "[a] reprisal includes..... any form of intimidation, retaliation, or harassment." It is deemed to be a reprisal for an employer to "depart from any customary employment practice" or "transfer or assign the individual to a lesser position in terms of wages, hours, job c Iass if i cation, job secur ity , or other employment status Minn Stat 363.03, subd. 7 (1990).

7. Pursuant to Minn. Stat. 363.01, subd. 14, discrimination based on sex includes sexual harassment. "Sexual harassment" is defined to include "verbal or physical conduct or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment..... or creating an intimidating, hostile or offensive employment..... environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat. 363.01, subd. 41.

8. A cause of action arises for damages under the Minnesota Human Rights Act in situations where an employee has been constructively discharged, i .e. where the employee has "resign[ed] in order to escape intolerable working conditions caused by illegal discrimination." Continental Can Co. vs. State, 297 N.W.2d 241 , 251 (Minn. 1980); see also Danz v. Jones, 263 N.W.2d 395, 403 n.4 (Minn. 1978) ("A resignation which is caused by illegal discrimination in a constructive discharge"); Wheeler v. Southland Corp., 875 F.2d 1246, 1249-50 (6th Cir. 1989) (if a reasonable employer would have foreseen that the employee would resign in the light of the treatment she was receiving, a constructive discharge claim will lie; the court affirmed a finding of constructive discharge where a convenience store manager stopped coming to work after being sexually harassed).

9. The Complainant established a prima facie case of discrimination b a

preponderance of the evidence with respect to her claims of sexual harassment,
retaliation, and disperate treatment.

10. To the extent that the Respondent articulated legitimate, nondiscriminatory reasons for its treatment of the Complainant, the Complainant established by a preponderance of the evidence that the Respondent's articulated reasons for its treatment of the Complainant were pretexts that are not worthy of belief and that sex discrimination was a discernible and substantial causative factor in her separation from employment.

11. The Respondent engaged in an unfair discriminatory practice in violation of the Minnesota Human Rights Act by failing to take prompt and appropriate action in response to the Complainant's reports of harassment by Richard Kipp despite its knowledge of Mr. Kipp's conduct.

12. The Respondent engaged in an unfair discriminatory practice in violation of the Minnesota Human Rights Act by constructively discharging the Complainant in reprisal for her having made reports to her supervisor of harassment by Mr. Kipp.

13. The Respondent engaged in an unfair discriminatory practice in violation of the Minnesota Human Rights Act by treating the Complainant less favorably than similarly situated male store managers in each of the following
respects:

(a) Holding her accountable for the inventory losses at Store 123 while not holding greater inventory losses against Michael Mahlow, her successor;

(b) Failing to respond to Ms. Vovk's reports of customer complaints about
Mr. Kipp pocketing money while responding immediately to identical reports
made by Michael Mahlow, her successor, by launching an investigation that led directly to the termination of Mr. Kipp's employment; and

(c) Failing to follow the discipline and discharge policy with respect to
the Complainant while following it with respect to male store manager Kevin Slavin.

14. The Respondent has the burden of proof to establish that the Complainant failed to mitigate her damages.

15. The Respondent failed to carry its burden of establishing that the Complainant failed to mitigate her damages.

16. Minn. Stat. i 363.071, subd. 2 (1990), permits an award of back pay to compensate a victim of discrimination for the wages she would have earned had she not been discriminated against. In this case, the Complainant's lost wages total $36.158.89.

17. Minn. Stat. i 363.071, subd. 2 (1990), permits an award of compensatory damages up to three times the amount of actual damages sustained by the Complainant The Complainant is entitled to compensatory damages in the amount of two times the amount of her lost wages, in the total amount of $72,318.00.

18. Under Minn. Stat. 363.071, subd. 2 (1990), victims of discrimination are entitled to compensation for mental anguish and suffering resulting from discriminatory practices. In this case, the Complainant experienced mental anguish and suffering as a result of the Respondent's discriminatory conduct and is entitled to compensation for the mental anguish and suffering she has sustained in the amount of $10,000.00.

19. Under Minn. Stat. 363.071, subd. 2, and the standards set forth in Minn. Stat. 549.20 (1990), punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. In this case, the Complainant is entitled to punitive damages in the amount of $6,000.00

20. Minn. Stat. 363.071, subd. 2 (1990), requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, the Respondent should pay a civil penalty to the State in the amount of $15,000.00.

21. Minn. Stat. 363.071, subd. l(a) (1990), permits the Administrative Law Judge to require the respondent to reimburse the charging party for reasonable attorney's fees. An award of reasonable attorney's fees and costs shall be made based upon an appropriate petition to be submitted by the Complainant's attorney.

22. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

(1) The Respondent shall cease and desist from the discriminatory practices set forth herein. All persons employed by the Respondent in a management or supervisory capacity shall receive appropriate training with respect to sexual harassment and employment discrimination based on sex.

(2) The Respondent shall pay the Complainant, Karen A. Vovk, damages for mental anguish and suffering in the amount of $10,000.00, punitive damages in the amount of $6,000.00, compensatory damages equal to two times lost wages in the total amount of $72,318.00, and prejudgment interest on lost wages of $36,158.59 from June 3, 1988, pursuant to Minn. Stat. 334.01 (1990).

(3) The Rescondent shall pay a civil penalty of $15,000.00 to the General Fund of the State of Minnesota. The payment shall be filed with the Commissioner of the Department of Human Rights for submission to the General Fun d .

(4) Reasonable attorney's fees and costs shall be awarded. The Complainant's counsel shall submit a petition for attorney's fees and costs within twenty days of receipt of this Order. The Respondent may submit argument on the reasonableness of the fees and costs requested within twenty days of the receipt of the Complainant's petition.

(5) All payments ordered shall be made within thirty calendar days of the
date of this Order.

(6) The effective date of this Order for purposes of appeal s ha II be the
date on which the Order award ing attorney' s fees and costs is issued

Dated this 23rd day of August, 1991.

BARBARA L. NEILSON
Administrative Law Judge

Reported i Tape recorded (28 tapes) .

MEMORANDUM

The Complainant in this case alleges that the Respondent violated the Minnesota Human Rights Act ("MHRA") by subjecting her to sexual harassment and failing to take prompt and appropriate remedial action, retaliating against her for complaining of the harassment, and treating her less favorably than similarly situated males. Complainant' s Post-Hearing Brief at 2. The MHRA provides that, "[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice..... [f]or an employer, because of . . . sex, . . . to discharge an employee; or . to discriminate against an employee with respect to..... terms, . conditions, facilities, or privileges of employment." Minn . Stat 363.03, subd. 1(2)(b) and (c) (1990). Discrimination based on sex is defined to include sexual harassment. Sexual harassment, in turn, i s defined to include "verbal or physical conduct or communication of a sexual nature when..... that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment," and "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat.

363.01, subd. 10a (1990).

The MHRA also specifies that "[i]t is an unfair discriminatory practice for any employer . . . to intentionally engage in any reprisal against any person because that person . . . opposed a practice forbidden under [the MHRA]." Minn. Stat. 363.03, subd. 7(l). A reprisal is defined to include "any form of intimidation, retaliation, or harassment" such as "departing from any customary employment practice" and "transferring or assigning the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status." Minn. Stat. 363.03 (1990)

Burden and Analysis of Proof

As both parties have noted, the Minnesota Supreme Court has often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 in interpreting Minnesota's Human Rights Act. Specifically, the Supreme Court has adopted the method of analysis of

discr imi nation c ases f irst set out in McDonnell Douglas Coop v. Green, 41 1 U.S. 792, 802-03 (1973). Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978); Sigurdson v. lsanti County, 386 N.W.2d 715, 719 (Minn. 1986). The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production then shifts to the complainant to demonstrate that the respondent's claimed reasons were pretextual. Anderson v. Hunter, Keith Marshall, and Co., 417 N.W.2d 619, 623 (Minn. 1989). The burden of proof remains at all times with the complainant. Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

In this case, the evidence establishes that the Respondent had more than one reason for removing the Complainant from her position as a store manager. While many cases involve a "single motive" by an employer in taking an employment action, a large number of cases involve "mixed motives" and a body of case law has developed to assist in analyzing these situations. In Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985), a federal employee brought a Title VII action claiming he had been denied a promotion because of his race. The trial court found that race was only a minor factor in the promotion decision and entered judgment for the defendant. The Eighth Circuit Court of Appeals held, to the contrary, that since race was shown to be a discernible factor, a violation of Title VII had been established. 778 F.2d at 1319. The Eighth Circuit went on to hold, however, that a defendant may avoid an award of reinstatement or promotion and back pay if it is able to prove that the plaintiff would not have been promoted even in the absence of the discrimination. 778 F.2d at 1323-24. In other words, if the employer is able to prove that the same decision would have been made if only legitimate, nondiscriminatory factors were considered, the relief that the employee receives may be limited to attorney's fees and injunctive relief.

Because other federal court decisions had handled mixed-motive cases differently (for example, by applying the "same decision" test to negate liability rather than merely restrict damages), the matter was finally resolved by the United States Supreme Court in Price Waterhouse, v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989). One treatise has described the effect of the Price Waterhouse decision as follows:

> With the advent of its 1989 decision in Price Waterhouse v. Hopkins, the Supreme Court set forth an analytical framework different than McDonnell Douglas for cases involving adverse employment decisions which are based on "mixed motives." The court distinguished "mixed motive" cases from the typical "pretext" case as analyzed under McDonnell Douglas. A "pretext" case resolves the question of whether an adverse employment decision was grounded in the illegal motive asserted by the plaintiff, or the legal motive offered by the defending employer.

> In a "pretext" case, one allegation or the other is found to be "true," whereas a "mixed motive" case lacks a single true motive. Drawing this distinction, the Court stated further that the analytical framework provided in Price Waterhouse "casts no shadow" on the old framework. Rather, the Price Waterhouse standard is a supplement, "for use in cases . . . where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion .
>
> Ac cord ing to Price Waterhouse, t he plantiff mu s t prove that the employer relied upon considerations that were discriminatory. The defendant, then, may avoid liability by showing that the same adverse employment decision would have been made even if no discriminatory considerations were present in the decision. It is not enough for the defendant to show that a decision would be justified in t he a b sence of d i s c r im inatory r ea son s ; rather, the defendant must show by a preponderance of the evidence that the same decision would have been made. The court characterized the defendant's burden as an affirmative defense.

3A Larson Employment Discrimination 102.42 (1991 footnotes omitted

The Minnesota Supreme Court dealt with the question of "mixed motives" in the Anderson case cited above. In that case, the trial court determined that while there was some evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge (dissatisfaction with her job performance), the plaintiff's pregnancy was a "discernible, discriminatory, and causative factor . . . of the defendant's discharge of plaintiff." The Minnesota Supreme Court specifically discussed and rejected the approach taken by the Eighth Circuit in Bibby v. Block with respect to damages in "mixed motive" cases. The Supreme Court also rejected the "same decision" analysis stemming from Mount HeAlthy-City School District Board of EducAtion v. Doyle, 429 U.S.274 (1977). Under the Mount Healthy analysis, the claimant has no recovery if an employer meets the burden of proving that the discharge would have occurred in the absence of discrimination . This is essentially the same ruling made by the United States Supreme Court in the Price Waterhouse case. The Minnesota Supreme Court stated that:

> We agree with respondent Anderson that not only is the Mount-Healthy- test at odds with our cases holding the McDonnell Douglas analysis is an appropriate one for application in disparate treatment cases alleging illegal discrimination, but also that its adoption for use in disparate treatment cases would defeat the broad remedial purposes of the Minnesota Human Rights Act by permitting employers, definitionally guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge.

417 N.W.2d at 626.

Therefore, although the Minnesota Supreme Court has on occasion adopted federal case law in interpreting the Minnesota Human Rights Act, the Anderson case makes it clear that it has rejected the "same decision" federal case law in "mixed motive" cases. Rather, when "a substantial causative factor entering into the decision to discharge an employee" is based upon an impermissible factor, the Minnesota Human Rights Act affords an employee remedies against the employer, including damages. 417 N.W.2d at 624. The Supreme Court indicated that the test employed by the trial court, namely, whether the impermissible reason for discharge was a "discernible, discriminatory and causative factor," was consistent with the McDonnell Douglas analysis and that the McDonnell Douglas analysis should be employed in interpreting the Minnesota Human Rights Act.

The Respondent suggests in its post-hearing brief that this is not a mixed motive case since it has not conceded any discriminatory motivation. As discussed more fully below, however, the record in this case supports a determination by the Administrative Law Judge that the Complainant's sex was a factor in her separation from employment- The Respondent also suggests that the Complainant's interpretation of the Anderson case conflicts with a McDonnell Douglas analysis. As indicated by the Minnesota Supreme Court and by Professor Larson, however, the "mixed motive" doctrine does not "cast a shadow" on the McDonnell Douglas framework. Rather, it provides additional guidance for analysis of cases in which there is more than a single motive, As the Complainant urges in her post-hearing brief, the treatment of a "mixed motive" occurs at the last stage of the McDonnell Douglaa analysis, which is ordinarily called the "pretext" stage. The Complainant urges that she can prevail by showing that her protected classification more likely than not played some role or by showing that the employer's explanation is unworthy of belief. However, the Administrative Law Judge does not interpret Anderson to mean that liability exists if an impermissible factor played an, role, however minor. Rather, the Complainant must show that discrimination based on sex was a discernible and causative factor in her separation from employment and that it was a "substantial causative factor." The Complainant need not show that it was the only factor. Neither, under Anderson, can the Defendant prevail by showing that it would have made the same decision in the absence of the unlawful discriminatory reason.

Sexual Harassment Claim

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged. A prima facie case of sexual harassment is established by showing that:

(1) The employee is a member of a protected class.
(2) The employee was subjected to unwelcome sexual harassment;
(3) The harassment complained of was based on sex;
(4) The harassment created an intimidating, hostile, of offensive working environment: and
(5) The employer knew or should have been aware of the harassment.

Bersie v. Zycad Corp., 399 N.W.2d 141, 146 (Minn. App. 1987), citing Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)

The Complainant established a prima facie case of sexual harassment and ultimately proved her harassment claim by a preponderance of the evidence. The evidence presented at the hearing showed that the Complainant is a protected class member who was employed by the Respondent and that she was subjected to unwelcome sexual harassment that was based on sex and was directed at her because of her sex. As the 8th Circuit Court of Appeals noted in Hall v. Gus Construction Co., 842 F.2d 1010, 1013-14 (8th Cir. 1988), the actions underlying a sexual harassment claim "need not be clearly sexual in nature . . . Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit Sexual advances." Id. at 1014 (citations omitted). Courts construing Title VII of the Civil Rights Act of 1964 have held that an employer must provide a work environment free of intimidation, ridicule or disrespect based on an employer's race or sex. See 3 Larson, Employment DjscrjminAtion VHH DOVR 6QHOO Y 6XIIRO. County, 611 F.Supp. S21 (E.D.N.Y. 1985), aff'd, 782 F.2d 1094 (2d Cir. 1986). The Minnesota Supreme Court has also recognized that the use of racial epithets accompanied by disparate treatment and other humiliating behavior is actionable. Lam(v. Village of Bagley, 310 N.W.2d 508 (Minn. 1981).

In this case, there was convincing proof that another employee of the Respondent, Richard Kipp, shouted at the Complainant that she was a "God damned fucking bitch," a "bitch," a "whore," a "tramp," and a "slut," and described activities of Duluth prostitutes to the Complainant on several occasions in order to express a sexual interest in her. Mr. Kipp further shouted at the Complainant that he had not had sex in ten years, asked her how that would make her feel, and asked her whether she had had sex with her boyfriend. Mr. Kipp also made sexually offensive remarks about the Complainant's boyfriend to another store employee. Despite the Respondent's arguments to the contrary, the use of sexual epithets and discussion of sexual activities clearly constitutes verbal conduct of a sexual nature within the meaning of the MHRA, and cannot properly be viewed as mere attempts by Mr. Kipp to express his unhappiness with his work load or Ms. Vovk's management style. Even though certain of Mr. Kipp's remarks were not made in Ms. Vovk's presence, they were made in the workplace and Mr. Kipp could have reasonably foreseen that Ms. Vovk would learn of his comments. Mr. Kipp's conduct, taken as a whole, clearly created an intimidating, hostile and offensive working environment for the Complainant.

The Complainant also established that the Respondent knew or should have been aware of the harassment. The Complainant complained about Mr. Kipp's conduct on several occasions to her supervisor, Tom Johnson. Mr. Johnson recalled that Ms. Vovk complained to him noncerning Mr. Kipp's April 1988 and June 3, 1988, outbursts and Mr. Kipp's statement in the cooler that the Complainant's boyfriend had only hired a sixteen-year-old female to work for him because he wanted to have sex with her. Although Mr. Johnson could not recall whether Ms. Vovk had complained to him about Mr. Kipp's discussions of

the activities of Duluth prostitutes, Ms. Vovk credibly testified that she had made such a complaint, Despite receiving these complaints from Ms. Vovk and being told that Mr. Kipp's April outburst caused her to fear for her physical safety, neither Mr. Johnson nor any other Tom Thumb personrel warned Mr. Kipp to discontinue such behavior, disciplined him, or took any other steps to put a halt to the conduct. When Ms. Vovk sought Mr. Johnson's advice concerning disciplinary action to be taken against Mr. Kipp, he either said nothing or advised against such discipline. With respect to the April 1988 incident, his advice to Ms. Vovk was to "let it slide," because Mr. Kipp was "just blowing off steam." In fact, with one exception, Mr. Johnson made no attempt even to look into Ms. Vovk's allegations. The exception involved the "cooler"

incident, where Mr. Johnson asked Ms. Vovk to arrange a meeting with the customer who overheard the remark and told her that Mr. Kipp wanted to .confront" the customer. Ms. Vovk told Mr. Johnson that the customer was unwilling to meet with Mr- Kipp. Mr. Johnson made no attempt to meet with the customer himself and did nothing more to investigate the situation.

Because Mr. Johnson supervised several store managers and was acting within the scope of his supervisory duties when Ms. Vovk reported the harassing conduct to him, and because the Respondent did not have an established procedure for store managers to report harassment, Mr. Johnson's knowledge of the harassment should be imputed to the Respondent. See McNabb v. Cut Foods, 352 N.W.2d 378 (Minn. 1984). The Respondent thus knew or should have known of the sexual harassment, and failed to take prompt and appropriate remedial action once it learned of the harassment as required by relevant case law. See Tretter y. Liquipak International, Inc., 356 N.W.2d 713, 716 (Minn. App 1984); Continental Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980); Wirig v. Kinney $hoe Corp., 448 N.W.2d 526 (Minn. App. 1989), aff'd in relevant part, 461 N.W.2d 374 (Minn. 1990).

The Respondent has not succeeded in rebutting the Complainant's sexual harassment claim by establishing legitimate, nondiscriminatory reasons for its treatment of the Complainant's complaints of sexual harassment which are not a mere pretext for discrimination. The Respondent apparently attempts to justify its failure to investigate or otherwise respond to the Complainant's reports of Mr. Kipp's conduct by contending, in essence, that the Complainant herself bore the sole responsibility for taking appropriate action against Mr. Kipp. The Respondent claims that because Ms. Vovk had the power to dismiss or suspend Mr. Kipp, she had control over her working environment and was not in fact subjected to sexual harassment. Respondent's Post-Hearing Brief at 7.

The evidence presented at the hearing was conflicting concerning whether store managers in fact had the authority to discharge or suspend employees without the advance approval of their supervisors. I/ In any event, however,

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1/ As the Complainant points out in her reply brief, the Tom Thumb Disciplinary Policy in effect at the time of Ms. Vovk's employment provides that "[p]rior approval from the Loss Prevention/Security Department must be obtained before any employee is placed in the status of suspension."

Complainant's Ex. 9. p. 4-21. In addition, the Manager's Manual requires the signatures of the manager who "requested" a change in an employee's status ,including dismissal) and the supervisor who "approved" the change. Respondent's Ex. C, pp. 4-15. In each instance in which Ms. Vovk had discharged an employee, she had either obtained prior permission from a supervisor or was instructed by a superior to take that action. However, Ms. Vovk's supervisor, Tom Johnson, testified that store managers merely had to pass a discharge decision by their supervisors not so much for their approval as to merely let them know about it, and Joseph Andrew, former Director of Training for Tom Thumb and current Director of Human Resources, testified that store managers could suspend or discharge an employee without obtaining the permission of their supervisors.

Ms. Vovk's failure to take disciplinary action against Mr. Kipp cannot insulate the Respondent from liability under the facts of this case. Ms. Vovk repeatedly reported the offensive conduct to her supervisor, Tom Johnson, and sought his advice concern ing the impositi on of discipline . She was uncertain how to proceed in an objective fashion because she was the person who was being harassed, so she sought the opinion of her supervisor. 21 The Tom Thumb sexua I harassment pol icy provided no guidance to the Complainant , since it applied only to employees who felt that the i r supervisor was harassing them and implied that only such situations violated anti-discrimination laws. 3/ The Respondent's witnesses agreed that there was nothing improper about a store manager seeking the advice of her supervisor before imposing discipline, and conceded that it might even be advilable to seek such advice in an attempt to ensure that adequate grounds existed for the taking of an adverse action. Even if Ms. Vovk could herself have taken disciplinary action against Mr. Kipp, it was no less the Respondent's responsibility to take prompt steps to investigate and remedy the situation once she brought it to her supervisor's attention and sought guidance. The Complainant has established her claim of sexual harassment.

Retaliation Claim

A prima facie case of reprisal or retaliation must be established by showing :

(1) Statutorily-protected conduct;
(2) Adverse employment action by the employer; and
(3) A causal connection between the two.

Tretter v . Liquipak International , Inc , 356 N . W. 2d 71 3 , 71 5 (Minn . App. 1 984) ; Sahs v . Amarillo Equi ty Investors_ In(, , 702 F . Supp . 256 , 259 (D. Colo 1988) Holland v. Jefferson National Life Insurance Company 823 F.2d 1307, 1313-14 (7th Cir. 1989). These cases treat as "statutorily-protected conduct" an employee's report to a supervisor of conduct she believed to be

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2/ Ms. Vovk's decision to seek the advice of Mr. Johnson with respect to Mr. Kipp was also understandable because Mr. Johnson had recommended Mr. Kipp's initial hire despite Ms. Vovk's advice, and because Mr. Kipp had become a valued employee and had been working directly for Mr. Johnson during several

months in 1988.

31 Ms. Vovk can hardly be criticized for failing to discipline Mr. Kipp for "sexual harassment" or for failing expressly to refer to "sexual harassment" or the sexual harassment policy in reporting her complaints to Tom Johnson. The policy addressed only harassment of subordinates by supervisors, and thus was a wholly inadequate summary of the conduct prohibited by state and federal civil rights laws. The policy thus failed to alert Ms. Vovk to Tom Thumb's interest in remedying sexual harassment when the victims involved were managerial personnel. See Meritor Saving; Bank, FSB v. Vinson, 477 U.S. 57, 72-73 (1986).

sexual harassment. As long as the employee in good faith Believes that she is being harassed and her allegations are not "utterly baseless," retaliation against the employee because she made the allegations will give rise to liability even If the conduct about which she complained did not in fact qualify as sexual harassment under the statute. Holland, 383 F.2d at 1315-16 and n. 6. A "causal connection" between the employee's conduct and the employer's action may be established by showing that the adverse employment action occurred shortly after the employee engaged in protected activities. Sahs , 702 F . Supp . at 259 , quoting Pedreyra v . Cornell prescription Pharmacies, 465 F. Supp. 936, 948 (D. Colo. 1 979) ; Holland, 883 F. 2d a t 1 31 5, and the cases cited therein.

Ms. Vovk established a prima facie case of retaliation in violation of the MHRA. She in good faith relayed to her supervisor her complaints about the conduct of one of her subordinates that she believed constituted sexual harassment. As determined above, these allegations of harassment clearly were not baseless. The Respondent's decision to remove her from her position of store manager and offer her a demotion to assistant manager in itself constituted an adverse employment action and must, under the circumstances of this case, be viewed as a constructive discharge of the Complainant. An employee's resignation is treated as a discharge if it was caused by discriminatory treatment. Danz v. Jones, 263 N.W.2d 395, 403 n. 4. (Minn. 1978) ("a resignation which is caused by illegal discrimination is a constructive discharge"); Continental Can Co. v. State, 297 N.W.2d 241, 251 (Minn. 1980) ("a constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination"). A constructive discharge will be found if a reasonable employer would have foreseen that the plaintiff would resign in the light of the treatment she was receiving. Wheeler v. Southland Corp., 875 F.2d 1246, 1249-50 (6th Cir. 1989) (the Court of Appeals affirmed a finding of constructive discharge where the plaintiff, a convenience store manager, stopped coming to work after being sexually harassed).

In this case, a reasonable employer should have foreseen that Ms. Vovk would resign In light of the treatment she had received. Ms. Vovk complained

repeatedly to Mr. Johnson about Mr. Kipp's conduct, but virtually nothing was done to stop the harassment. Mr. Johnson told her that he and Mr. Cellette would come to her store on June 3, 1988, presumably to take appropriate action against Mr. Kipp. Instead, Mr. Johnson and Mr. Cellette arrived at the store, conducted a cash audit, found some minor policy violations, and told her they had to "let her go" for "losing control of an employee" and violating company policy. At the very end of the meeting, Mr. Cellette offered her a demotion to assistant manager- Because the Respondent had virtually ignored the Complainant's numerous reports of harassment, blamed her for Mr. Kipp's conduct, and terminated her from her store manager position without adhering to the progressive disciplinary policy, it was clearly foreseeable that Ms. Vovk would not accept the offer of the assistant manager position. The situation warrants a finding of constructive discharge.

Moreover, the Complainant established that there was a causal connection between her allegations of sexual harassment and the adverse employment action taken by the Respondent. The strongest evidence of a causal connection between Ms. Vovk's complaints regarding Mr. Kipp and her removal is Mr. Cellette's statement to Ms. Vovk at the time that he had decided to "let her go" at least in part because she was "losing control" of an employee, presumably Mr. Kipp. This raises an inference that the adverse action was

motivated by Ms. Vovk's report to her supervisor regarding Mr.Kipp's harassing conduct and her decision to seek her supervisor's advice or approval regarding the proper way to handle the situation. Moreover, although (as the Complainant notes), the Respondent's evidence about when the decision was made to let Ms. Vovk go is "hopelessly contradictory" (Complainant's Post-Hearing brief at 21), each of the Respondent's witnesses' theories concerning the approximate date on which the decision was made corresponds closely to the dates on which Ms. Vovk complained of harassment. For example, Joseph Andrew, who was then the Respondent's Director of Training, testified that he was informed that Ms. Vovk was going to be replaced three to four weeks before her discharge. This would have been shortly after Ms. Vovk made a complaint in April 1988 to Mr. Johnson concerning Mr. Kipp's discussion of the Duluth prostitutes and his first outburst in the store. In its submission to the Department of Human Rights, the Respondent indicated that Ms. Vovk was discharged approximately two weeks after her complaint about the "cooler incident." If, as Mr. Johnson testified, Messrs. Johnson and Cellette made the decision to discharge Ms. Vovk seven to ten days prior to June 3, 1988, that decision would have been made only four to seven days after Ms. Vovk complained about the cooler incident. If, as Mr. Cellette testified, he and Mt. Tenness en made the decision to terminate Ms. Vovk on the very morning she was removed from her managerial position, that was the same morning Ms. Vovk had complained to Mr. Johnson about Mr. Kipp's alleged remark to a co-worker that Ms. Vovk had gone home the previous day to have sex with her boyfriend.

Because (1) Ms. Vovk engaged in statutorily-protected conduct by complaining of sexual harassment, (2) Ms. Vovk was constructively discharged from her position, and (3) the decision to discharge Ms. Vovk was made, according to each account offered by the Respondent, only a short time after she lodged a complaint about Mr. Kipp's conduct, all three elements of a prima facie case of retaliation have been established.

The Respondent articulated legitimate, nondiscriminatory reasons for its decision to remove the Complainant from her position as a store manager. The

Complainant has established, however, that the reasons offered by Tom Thumb for her removal are not worthy of belief. Applying the analysis set forth in the Anderaon case, the record as a whole shows that, even if all of the reasons argued by the Respondent are taken into account, sex discrimination was a discernible and substantial causative factor in Ms. Vovk's termination from employment. As discussed in detail below, it is evident that Ms. Vovk was removed from her position in part for reporting sexual harassment to her supervisor and seeking his advice and approval prior to implementing discipline against Mr. Kipp, and that the Respondent chose this course of action rather than taking prompt and appropriate action against Mr. Kipp.

The credibility of the explanations proffered by the Respondent was significantly weakened by inconsistent statements in exhibits and testimony provided on behalf of the Respondent concerning the identity of the persons who made the decision to remove Ms. Vovk, the date the decision was made, and the reasons for her removal. For example, George Cellette testified that he believed that he, Tom Johnson. and Dennis Tennessen made the decision to relieve Ms. Vovk of her duties on the same day that they informed Ms. Vovk of the decision (June 3, 1988), Mr. Tennessen denied playing any role at all in the decision to terminate. demote, or remove Ms. Vovk. Mr. Johnson testified that he and Mr. Cellette made the decision to relieve Ms. Vovk of her duties approximately one week to ten days before June 3, 1988. Joseph Andrew testified that he was consulted by Mssrs. Tennessen and Cellette three to four weeks prior to June 3, 1988.

The conflicting evidence with respect to the description of the reasons for Ms. Vovk's removal was even more striking. Ms. Vovk testified that she was told on June 3, 1988, that she was being "let go" as store manager because she had "lost control of an employee" and had "violated company policy." Ms . Vovk understood that the policy violation to which Mr. Cellette referred were those revealed as a result of the cash audit. Mr. Cellette admitted telling Ms . Vovk that she was being removed because she was losing control of an employee and had violated company policy, but testified that the policy violations noted as a result of the June 3, 1988, cash audit had nothing to do with his decision to remove her. Mr. Cellette also alleged that he mentioned during his June 3 discussion with Ms. Vovk that the store inventories were "bad news," the store was starting to decay and was not improving, and that the store was "too big a load" for her to handle.

The Administrative Law Judge has credited the testimony of Ms. Vovk concerning the June 3 discussion. The record supports the determination that the Respondent in fact relied upon the results of the cash audit and the alleged loss of control of an employee in reaching its decision to remove Ms. Vovk, and did not rely upon or mention to Ms. Vovk the additional reasons cited by Mr. Cellette. Ms. Vovk's testimony was found to be more credible than Mr. Cellette's because Mr. Cellette's recollection of the June 3 discussion was clearly faulty. He did not accurately recall the position he offered Ms. Vovk at that time (he testified that he offered to retain Ms. Vovk as a store manager and simply move her to another store, contrary to the otherwise consistent testimonial and documentary evidence that Ms. Vovk was offered a demotion to an assistant manager's position). In addition, Mr. Johnson, who was also present during the June 3 discussion, did not corroborate Mr. Cellette's testimony that the additional reasons were discussed. Moreover, the personnel action form completed by Tom Johnson on June 6, 1988, and the Respondent's response to Ms. Vovk's Unemployment compensation claim dated June 14, 1988, also referred to tie policy violations revealed as a result of the cash audit when discussing reasons for the removal.

The Administrative Law Judge is persuaded that the loss of control and policy violations alleged by the Respondent for the removal of Ms. Vovk are

not worthy of belief and thus constitute a mere pretext for discrimination.
By taking adverse action against Ms. Vovk for "losing control" of Mr. Kipp,
the Respondent in essence sought to penalize the victim of sexual harassment
for reporting the harassing conduct and seeking the advice and approval of her
supervisor concerning the proper handling of the situation. This purported
justification for Ms. Vovk's removal clearly constitutes a mere pretext for
discrimination Moreover, the Regpondent's apparent reliance on the
violations of company policy revealed by the results of the cash audit also
was a pretext for discrimination, since Mssrs. Cellette and Johnson had
already made the decision to relieve Ms. Vovk of her store manager duties
prior to their arrival at Store 123 on June 3, 1988, and the cash audit thus
was conducted in an attempt to find problems to justify the already-planned
adverse action.

There is no mention in the early accounts of the reasons for Ms. Vovk's
removal of any other problems with Ms. Vovk's performance. It was not until
much later, in response to Ms. Vovk's charge of discrimination and in
testimony at the hearing, that the Respondent no longer emphasized the cash
audit results or the loss of control over an employee, but instead alleged
that Ms. Vovk was removed because she had a host of other performance-related
problems. These deficiencies allegely included a loss of overall control of
the store, problems with inventory losses, difficulty with implementing price

changes, f ailing to open the store on time on some days, leaving the store in early afternoon at various times prior to completing her duties as manager, failing to keep the store neat and orderly, failing to require store employees to project the type of customer service the Respondent requires, improper maintenance of the produce rack, failing to adequately stock certain products, failing to require store employees to adhere to the dress code, and declining store profitability. The fact that these reasons were not mentioned until months after the adverse action was taken or, in some instances, until this proceeding, raises an inference that they were formulated after the fact and are not genuine.

Furthermore, the evidence presented by the Complainant at the hearing shows that the alleged performance deficiencies on which the Respondent primarily focused at the hearing were merely a pretext for discrimination. For example, as pointed out in the Findings of Fact and in the discussion of the disparate treatment claims below, it appears that the inventory control problems at Store 123 existed even at the time Ms. Vovk received her "above average" rating in December 1987 and that, although they worsened under Ms. Vovk's successor, Michael Mahlow, he was never disciplined or discharged based upon the inventory problem, Such differential treatment of Ms. Vovk greatly undermines the legitimacy of the inventory control problems as a rationale for the removal of the Complainant.

The Respondent's allegation that Ms. Vovk opened the store late approximately once a week was refuted by an examination of the information supplied by the Respondent with respect to the times at which the a I arm system was deactivated. That information reveals that the alarm at Store 123 was deactivated after the scheduled opening time on only two occasions during the period of January 1, 1988, through June 3, 1988, and that the alarm was deactivated less than fifteen minutes before the scheduled opening time on only four other occasions (on two of the latter occasions, the alarm was deactivated fourteen minutes before the scheduled opening time). Mr. Cellette testified that some store managers can accomplish their pre-opening duties in

fifteen minutes. The isolated and infrequent occasions of tardiness noted above clearly provide no support for the Respondent's claim that the store was opened late approximately once a week. The deficiency alleged by the Respondent in this regard is a mere pretext for discrimination.

The alleged deterioration in the condition of the store was shown to be pretextual by the testimony of three vendors and a former Tom Thumb assistant manager familiar with Store 123 and other Tom Thumb stores, as well as by the "good" and "excellent" monthly evaluations given to Store 123 by the inventory rating service.4/ Finally, the Complainant established that the alleged deterioration in the profitability of the store was a mere pretext for discrimination. The Complainant showed that the exhibit relied upon by the Respondent as evidence of the lack of profitability of the store fails to take

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4/These ratings are the only existing documentation with respect to the condition of Store 123 during February through May 1988 and were supplied after the hearing as part of the documents underlying Respondent's Exhibit D. The Administrative Law Judge grants the Complainant's motion to admit these ratings as Complainant's Exhibit 44. The Administrative Law Judge also grants the Complainant's motion to admit the May 1988 Daily Sales Reports as Complainant's Exhibit 43.

into account changes in company policy and several factors beyond Ms Vovk's control (e.g., the closing of the laundromat and resulting loss of Tom Thumb customers, the elimination of ad allowances from the accounting of individual stores, the freezer breakdown, and the inventory loss apparently resulting from Mr. Kipp's employment), and thus does not accurately compare the profitability of Store 123 during Ms. Vovk's tenure with that of the store during her predecessor's tenure.

The pretextual nature of the reasons proffered by the Respondent for Ms. Vovk's removal is underscored by the Respondent's f ailu re to issue any warnings to the Complainant prior to her discharge notifying her of deficiencies in her performance and providing her an oppor tunity to improve Although Mr. Andrew stated that the policy was not intended to apply to store managers, Ms. Vovk's immediate supervisor, Tom Johnson, testified that the disciplinary policy applied to store managers and that the deficiencies alleged by the company with respect to Ms. Vovk would have constitruted "minor offenses" for which Step I warnings were appropriate. Mr. Cellette testified that it "could" have been appropriate to issue a step warning for Ms. Vovk's deficiencies.5/ Mr. Mahlow also testified that it was explained during Tom Thumb's management training sessions that written warnings were for anyone who worked for the company, including store managers and supervisors. The discipline and discharge policy is written in language that implies coverage of all employees, and mandates progressive discipline prior to discharge except in cases of gross misconduct. Significantly, the manager of another store, Kevin Slavin, received a warning notice in April 1987 noting, inter alia, the need for improvement of his general store appearance, cleanliness of the deli, and organization of the back room and office.

In light of the evidence to the contrary, Mr. Andrew's testimony that the policy did not cover store managers is not credible. The record as a whole supports the conclusion that the types of deficiencies alleged by the Respondent with respect to the Complainant's performance constituted minor offenses under the policy for which the issuance of an initial Step I Warning Notice would have been appropriate. No such warnings were ever issued to the Complainant prior to her removal. Thus, while some form of disciplinary

action against Ms. Vovk may have been justified based upon certain of the deficiencies alleged by the Respondent, the Complainant has succeeded in demonstrating by a preponderance of the evidence that the disciplinary action in fact taken against her (removal and demotion) was a pretext for sex-based discrimination. The Complainant therefore has established her claim of retaliation.

Disparat, Treatment Claim

To establish a prima facie case with respect to the Complainant's claims of disparate treatment, the Complainant must establish that:

5/ Mr. Cellette later testified that the discipline and discharge policy applied "more [to employees under the manager."

(1) She is a member of a protected group;
(2) She was qualified for the benefit in question;
(3) The employer took adverse action with respect to that benefit;
(4) The benefit was awarded to persons who were not members of her protected group.

See generally Sigurdson v. Isanti County , 386 N W. 2d 71 5, 720 (Minn. 1 986) .
In order to satisfy the element requiring the showing of qualification for the benefit in question, the plaintiff need only establish that she possessed the minimum qualifications necessary for the benefit. $IV Legrand v. Trustees of the University of Arkansas at Pine Bluff, 821 F.2d 478, 481 (8th Cir. 1987) and the cases cited therein. Whether the employee's performance was deficient and warranted denial of the benefit is a question to be decided when considering the articulation of legitimate, nondiscriminatory reasons for the employment action or proof of pretext. Id.

The Complainant established a prima facie case that she was treated less favorably than simi larly situated male store managers in several respects.
First, the record showed that the Respondent sought to remove Ms.Vovk from her store manager position based in part upon inventory losses in her store even though it did not discipline or otherwise hold Ms. Vovk's successor, Michael Mahlow, responsible for even higher inventory losses experienced at Store 123 after Ms. Vovk left. Second, Ms. Vovk established that the Respondent did not install security cameras to investigate Ms. Vovk's report to her supervisor that a customer had observed Mr. Kipp pocketing money but di, take such action when Mr. Mahlow made an identical report. When Ms. Vovk reported the customer complaint to Mr. Johnson, the only step he took was to speak to Mr. Kipp about it in a fashion which suggests that he did not take the report seriously (Mr. Johnson prefaced his questioning of Mr. Kipp with the statement, "You won't believe this but . . .)." After the security cameras were installed in response to Mr. Mahlow's report, Mr. Kipp was observed failing to require payment for groceries, and he submitted his resignation. The Respondent failed to articulate legitimate, nondiscriminatory reasons for the differential treatment of Ms. VovK vis-a-vis Mr. Mahlow. The presumption of discrimination raised by virtue of the Complainant's prime facie case thus was not rebutted, and the Complainant has established her claim that she was

treated unfairly in this regard.

The Complainant also established a prima facie case of disparate treatment with respect to the Respondent's decision to remove her from her store manager posi tion and offer her a demotion to assistant manager. The record showed that the Respondent did not issue any warnings to Ms. Vovk prior to removing her from her store manager position. The Respondent did, however, issue a warning in April 1987 to another store manager, Kevin Slavin, for sexual harassment and a lack of cleanliness and organization in his store. The warning notice provided Mr. Slavin with notice of the deficiencies in his performance perceived by Tom Thumb, a period of time within which to correct the deficiencies, and a clear warning of what would happen if the Step Warning Notice was not heeded. Mr. Slavin remained a store manager for Tom Thumb as of the date of the hearing.

The Respondent articulated a legitimate, nondiscriminatory reason for its failure to issue progressive discipline prior to Ms. Vovk's removal. At the hearing, certain of the Respondent's witnesses testified that the store managers were not covered by the disciplinary policy and thus were not

entitled to receive warning notices prior to discharge. Ps noted in the discussion of the Complainant's retaliation claim above, this testimony was not credible in light of the contrary testimony, the warning notice afforded Mr. Slavin, and the broad language of the policy itself. The Respondent's proffered explanation for its treatment of the Complainant thus is unworthy of credence.

Relief

Minn. Stat. 363.071, subd. 2 (1990), authorizes an award of compensatory damages to the victims of discrimination under the MHRA. The general purpose of the damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred. Anderson_v. Hunter__Keith,Marshall & Company 41 7 N. W.2d 61 9, 626 (Minn . 1 988) ; Brotherhood of Railway And Steamships Clerks v. Balfour, 303 Minn. 178, 229 N.W.2d 3, 13 (1975). Persons complaining of discrimination, however, "do have the duty to minimize damages by using reasonable diligence in finding other suitable employment." Anderson, 417 N.W.2d at 626, quoting Ford Motor Co. v. EEOC, 258 U.S. 219, 231 (1982).

The employer bears the burden of proving that a complainant did not mitigate her damages. Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Sprogis v. United Airlines, 517 F.2d 387 (7th Cir. 1975); acoord Henry v. Metropolitan Waste Control Commjssion , 401 N. W.2d 401 , 406 (Minn. App. 1987) (discharge of veteran); Spurck v. Civil Service,Board, 42 N.W.2d 720, 727 (Minn. 1950) (discharge of public employee). In order to bear its burden, the employer must show that (1) substantially equivalent positions were available for the complainant to take, and (2) the complainant did not exercise reasonable diligence in seeking positions. Wooldridge v. Marlene Industries , 49 Fair Empl. Prac . Cus . (BNA) 1 455 (6th Cir . 1 989) .

Tom Thumb argues that Ms. Vovk failed to mitigate her damages in several respects. First, the Respondent contends that Ms. Vovk's failure to take the assistant manager position offered to her on June 3, 1988, constitutes afailure to accept "what in effect was a lateral transfer with no reduction in salary to an assistant managership, with good prospects of her returning to full managership." Respondent's Post-Hearing Brief at 21. The record shows that Ms. Vovk's salary had she accepted the assistant manager position was never discussed. Mr. Johnson testified that Ms. Vovk's salary "probably" would have been reduced. Mr. Cellette provided inconsistent testimony with respect to the position offered Ms. Vovk. At the hearing, he testified that he was thinking of putting Ms. Vovk in another store as a store manager, and could not recall his testimony at his deposition about placing Ms. Vovk in an assistant manager position. He stated that "to his knowledge," the company was not going to give Ms. Vovk less pay. Mr. Cellette admitted in a portion of his deposition read into the record, however, that he was not aware of any Tom Thumb store in which the assistant manager was paid the same amount as the manager. Ms. Vovk herself had made substantial Ty less when she was employed by Tom Thumb as an assistant manager than when she became a store manager. Janice Moebus, the Respondent's expert witness, testified that she was familiar with Tom Thumb's operations, and that assistant managers made

considerably less than managers.

Based upon the record as a whole, the Administrative Law Judge has concluded that it is likely that Ms. Vovk's salary would have been reduced had she accepted the assistant manager position, a position that also involved

less responsibility than the store manager position. It is well established that the Complainant need not accept a demotion, a demeaning position, a lesser or dissimilar position, or a job below her qualifications in order to mitigate her damages. U. S. v. City of Chicago 853 F.2d 572 (7th Cir. 1988);
Ford Motor Co. v EEOC , 458 U S. 21 9 , 231 (1 982) ; Scofield v. Bolts & Bolts
Retail Stores, 21 F air Empl . Prac . Cus . (BNA) 1 478 (S.D. N. Y. 1 979) Ms. Vovk
thus has not been shown to have failed to mitigate her damages by declining the assistant manager position6/

The Respondent also contends that the Complainant failed to mitigate her damages because she did not seek convenience store or supermarket positions following her constructive discharge by Tom Thumb. The Complainant testified that, following her termination by Tom Thumb, she did not seek such positions because she lacked confidence in her ability to supervise employees and had become disenchanted with the convenience store industry. The Respondent attempted to show the availability of convenience store and supermarket manager positions following Ms. Vovk's termination through its expert witness,
Janice Moebus. Ms. Moebus' testimony was substantially undermined during the cross-examination, however. Ms. Moebus admitted that she did not know the nature of the performance deficiencies alleged by the Respondent with respect to Ms. Vovk and had assessed the likelihood that Ms. Vovk could have obtained a convenience store or supermarket position based upon information that Ms. Vovk had resigned from her position at Tom Thumb after being relieved of her store manager duties and being offered an assistant manager position. Ms. Moebus conceded that a variety of factors, such as reputed lack of honesty or competence, could affect an individual's ability to find a job. Ms. Moebus also admitted that an employee's lack of interest or enthusiasm for work in a certain field might affect the employee's performance and quality of work. She conceded that she would advise a client to look elsewhere if the client had had a very bad experience in a prior job and had other employment options. Under these circumstances, the Respondent did not show that the Complainant failed to mitigate her damages by deciding not to apply for convenience store and supermarket positions or that substantially equivalent positions were available for Ms. Vovk to take.

Finally, the Respondent argues that Ms. Vovk took herself out of the full-time job market in September of 1990 by enrolling full-time at Inver Hills Community College. Generally, a full-time student may not be able to recover back pay if she removed herself from the job market in becoming a student. The decision to attend school full-time thus may not operate to counteract the obligation to seek work. Taylor v. Safeway_Stores, 524 F.2d 263 (1Oth Cir. 1975). However, the courts have been stmpathetic to students who remained open to employment. For example, in Smith v. American Service Co. of Atlanta, 796 F.2d 1460 (llth Cir. 1986), the back pay award was not reduced even though the plaintiff attended cosmetology school where the plaintiff worked part-time and continued to look for work. Additionally, in Gaddy v. Abex Corp. , 884 F 2d 575 (7th Cir. 1989), the employer attempted to show that the plaintiff had failed to mitigate her damages by failing to follow up on a job lead and attending school part-time The plaintiff

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6/Moreover, if Ms. Vovk's salary in fact would not have been decreased if she

had chosen to accept the assistant manager position, it would be reasonable to
expect that Mssrs. Cellette and Johnson would have stressed this point when they offered the position to her on June 3, 1988, in order to ensure that Ms. Vovk knew all of the relevant information and made an informed decision.

testified that she would have had to relocate to accept the job. The court held that the employer must prove a "reasonable probability" of a job offer and must prove that the plaintiff was not "ready, willing and able" to work as she had testified.

In this case, Ms. Vovk testified that she looks in the paper at least once a week for potential jobs, and would take a full-time job if she found one for which she was qualified even though she is in school. She decided to attend college in order to get a good education and improve her employment prospects. Ms. Vovk continues to work part-time as a school bus driver for a local school district. She went to work for the school district before her employment benefits were depleted, and has received substantial raises over the past three years. She currently earns $9.15 per hour. The Administrative Law Judge is persuaded that Ms. Vovk has acted reasonably. The Respondent has not borne its burden to show that the Complainant failed to mitigate her damages.

After adjusting for unemployment compensation benefits received and income from her bus driver position,7/ Ms. Vovk's lost wages for the period from her termination (June 3, 1988) to the last day of the hearing in this matter (February 1, 1991) are $36,158-89.

The Complainant has not requested reinstatement but has requested front pay. Front pay may be awarded in lieu of reinstatement when reinstatement is not feasible because of the particular circumstances, such as substantial animosity between the parties or evidence that the relationship between the parties would be unlikely to improve. Brooks v. Woodline Motor Freight Inc. 852 F.2d 1061 (8th Cir. 1988). It is evident that, given the deterioration in the relationship of the parties, the Complainant would not be comfortable if she were re-employed by Tom Thumb. Because the compensatory damages awarded are sufficient to make the Complainant whole, however, front pay is not necessary or appropriate in this case.

Pursuant to Minn. Stat 363.03 and 549.20 (1990), actual compensatory

damages in the amount of $72,318.00, plus prejudgment interest on $36,158.89 from June 3, 1988, punitive damages in the amount of $6,000.00, and a civil penalty in the amount of $15,000.00 have been ordered. Although the MHRA authorizes an award of up to three times the wages actually lost by a victim of discrimi nation, the Administrative Law Judge has Iimited the award to two times the lost wages because there was no evidence that the Respondent's discriminatory actions were widespread in the workplace8/ The punitive

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7/The Administrative Law Judge rejects the Respondent's view that the babysitting services provided by the grandmother of the Complainant's youngest child should somehow be taken into account in calculating damages in this case. There is no evidence that Ms. Vovk's termination from Tom Thumb caused her to incur less child care expenses or had any other effect on her child care arrangements.

$/The Respondent argues that the treble damage authorization in the MHRA is unconstitutionally vague, arbitrary and capricious , and in viol ation of the Minnesota Administrative Procedures Act. The Administrative Law Judge lacks authority to declare a governing statute unconstitutional. G. Beck, L. Bakken & T. Muck, Minnesota Administrative Procedure 8.5 (1987), and cases cited therein. This issue is preserved for appeal.

damages awarded take into consideration the factors set forth in Minn. Stat. 549.20. The Complainant has established by clear and convincing evidence t hat the Respondent showed a del I ber ate disregard for the rights and safety of Ms. Vovk by the discriminatory manner in which it treated her during her employment, including the manner in which it handled her complaints of sexual harassment and retaliated against her for making such complaints. The damages awarded reflect the serious nature of the Respondent's Improper conduct and its failure to take action to safeguard the Complainant in the face of her reports that she feared for her physical safety. Although there was no specific evidence presented at the hearing regarding the Respondent's current financial condition, the Respondent operates 180 to 200 convenience stores and employs approximately 1,500 employees, and thus appears to be financially st able . These factors were also taken into account in determining the amount of the civil penalty the Respondent must pay to the state. The amount of the civil penalty reflects the substantial investment of public resources in the hearing and determination of this matter.

The Complainant's request for damages for mental anguish and suffering in the amount of $75,000.00 appears excessive. The record does, however, support the conclusion that Ms. Vovk was upset and angry about Mr. Kipp's conduct and the Respondent's failure to take timely and appropriate remedial action, and was shocked and emotionally devastated by her constructive discharge and resulting anxiety about how she would provide for her family. The Complainant was visibly upset at the hearing and broke down in tears when testifying about her last day of employment at Tom Thumb. Her testimony that she has suffered from headaches, insomnia and depression and that she lacks confidence in her ability to manage employees as a result of the Respondent's treatment was credible. Ms. Vovk was able to cope without professional help, however, and it does not appear that she was severely traumatized or that her relationships with other persons were significantly disrupted. Under these circumstances, compensatory damages for the mental anguish and suffering Ms. Vovk experienced

as a result of the Respondent's actions should be limited to $10,000.00.

The Statute of Limitations

The Complainant left her employment with the Respondent on June 3, 1988. The statute in effect at that time required that she file her charge under the Minnesota Human Rights Act within 300 days of the occurrence of any prohibited practice. Minn. Stat. 363.06, subd. 3 (1986). That statute was then amended by the 1988 Legislature to extend the time in which to file a claim from 300 days to one year. Minn. Laws 1988 Ch. 660 6, The 1988 amendment was effective August 1, 1988. The Complainant filed her charge with the Department on March 27, 1989. If the 300-day period applies to this case, the Complainant's separation from employment would be within the 300-day period. As the Complainant points out, also within the period would be Mr. Kipp's remarks on June 2, 1988, as well as his conduct on June 3, 1988, immediately prior to the Complainant's discharge.

In its post-hearing brief, the Respondent argues that the Administrative Law Judge may not consider any events before May 31, 1988, since they would be barred by the statute of limitations. The Complainant argues that, to the contrary, incidents of sexual harassment occurring prior to May 30, 1988, are actionable under the "continuing violation" theory. Generally, to establish a continuing violation, the plaintiff must show a series of related acts one or more of which falls within the limitations period. The Minnesota Supreme Court recognized the doctrine in Hubbard v. united Press International Inc. 330 N.W.2d 428 (Minn. 1983) where it noted that:

> Accordingly, it seems clear that the trial court's determination that p laintiff's discrimi nation claim was not barred by the applicable statute of limitations was based on the "continuing violation" doctrine. The continuing violation doctrine has been applied by courts to toll the statute of limitation in employment discrimination actions when the discriminatory acts of an employer over a period of time indicate a systematic repetition of the same policy and constitute a sufficiently integrated pattern to form, in effect, a single discriminatory act.e.g. Brotherhood of Railway and-steamship Clerks v - State , 303 Minn . 178, 193, 229 N.W.2d 3, 9 (1975).

Id. at 440, n.11.

The Respondent argues that , in this case , the Complainant's discharge was an isolated single incident and was not integrated into a pattern of discrimination against her. It argues that no nexus has been shown between her alleged sexual harassment and her discharge. It therefore argues that May 31, 1988, is the cutoff date and that the Administrative Law Judge should not consider evidence regarding any events prior to that date.

The continuing violation doctrine was recently applied in the case of Melsha, v. Wicks Companie, In,., 459 N.W.2d 707, 710 (Minn. Ct. App. 1990) pet. for rev. denied (Minn. Oct. 25, 1990). The Melsha case involved an employee who was subjected to sexual harassment from October 1984 to November 1987, at which time she was constructively discharged. While the 300-day statute of limitations period extended back to July of 1987, several incidents of harassment had occurred prior to July of 1987. The Court of Appeals approved the trial court's determination that the earlier incidents were compensable as part of a continuing pattern of harassment which was facilitated by the defendant's failure to establish a dependable harassment policy, its failure to maintain adequate records of harassment incidents, and its failure to treat harassment with appropriate seriousness throughout the period of the plaintiff's employment. 459 N.W.2d at 710.

The facts of this case are similar to Melsha. The Respondent's sexual harassment policy was inadequate and the Complainant's complaints about harassment were not dealt with appropriately. Additionally, all of the harassment in this case concerned acts by the same individual and the acts occurring prior to May 30, 1988, were closely related factually to the ones occurring after that date. It cannot therefore be concluded that the Complainant's leaving the Respondent was an isolated incident without any relationship to the earlier sexual harassment. Under the case law cited above, the events about which Ms. Vovk complains are properly considered a continuing violation.

The parties also presented argument in their briefs as to whether the statute of limitations on the Complainant's claims was extended to one year by the 1988 amendment to Minn. Stat. 363.06, subd. 3. The Respondent argues that this would be a retroactive application and that the Legislature did not state any intent to apply the amendment retroactively. Viereck v. Peoples

Savings and Loan Association, 343 N.W.2d 30, 34 (Minn. 1984). The Complainant maintains that, since none of the Complainant's claims had expired on August 1, 1988, the new one-year limitation period applies to those claims. She argues that the extension of a statute of limitations period is not retroactive within the meaning of Minn. Stat. 645.21 unless it revives a claim that has already been barred. Klimmek v. Independent School District No. 487, 299 N.W.2d 501, 503 (Minn. 1980).

Although the disposition of the continuing violation theory above makes it unnecessary to decide this question, it does appear that the case law permits application of the one-year period. The Viereck case does indicate as a general proposition that a statute is deemed to operate retroactively only if the legislative body enacting evidences a clear expression to do so. 343 N.W.2d at 34. However, case law which deals more specifically with the amendment of statutes of limitation indicates that an extension of the limitations period operates in favor of causes of action against which the limitation has not run. Donovan v. Duluth St. Ry. Co. 150 Minn. 364, 185 N.H. 388, 389 (1921). In the Klimmek case, the Minnesota Supreme Court stated that, where a subsequent statutory amendment extends the time in which an employee may file a claim, and the claim has not already been barred prior to the effective date of the amending statute, the new amendment applies and permits the employee to prosecute his claim after it would have been barred under the prior statute. Klimmek 299 N.W.2d at 502. Accordingly, the one-year period would apply to the Complainant's claims.

B.L.N.